Supreme Court, U.S.
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No. 06-741

In The

Supreme Court of the United States

In Re: CYNTHIA MORGAN RIPPSTEIN, *Debtor*

TAPSS, LLC, *Petitioner*

v.

NUNEZ COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it was error to deny a motion to certify question to the Texas Supreme Court in a case that was commenced in Texas state court by the debtor but then brought to the federal courts by the debtor filing bankruptcy, where the issue involved is whether a Texas judgment *lien* remains valid and enforceable so long as the underlying Texas *judgment* remains valid and enforceable, in which there was no definitive Texas Supreme Court opinion on the issue, and the lower federal courts refused to certify the question, but instead relied on *dicta* from a 1931 opinion and ignored a contrary 1985 opinion.

PARTIES TO THE PROCEEDINGS

Petitioner is TAPSS, LLC.

Respondent is Nunez Company.

CORPORATE DISCLOSURE STATEMENT

Petitioner represents that neither party to this proceeding has any parent corporation or has 10% or more of its stock owned by any publicly held company. Respondent Nunez Company is insured by Chicago Title Insurance Company, a Missouri Corporation, which is a wholly owned subsidiary of Fidelity National Title Group, Inc., a publicly traded corporation, which is a majority owned subsidiary of Fidelity National Financial, Inc., a publicly traded corporation.

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In The

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In Re: CYNTHIA MORGAN RIPPSTEIN, *Debtor*

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v.

NUNEZ COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner TAPSS, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals will be reported in a future volume of the Federal Appendix, and is reproduced in the Appendix at A 1-6. The District Court's Opinion and Order denying Petitioner's motion to certify question and affirming the Bankruptcy Court's granting partial summary judgment to Respondent is unreported and reproduced in the Appendix at

A 9-15. The Bankruptcy Court's Order granting Respondent's motion for partial summary judgment is unreported and reproduced in the Appendix at A 15-18.

STATEMENT OF JURISDICTION

The Court of Appeals' judgment was entered on July 10, 2006. A timely motion for reconsideration of the motion to certify question to the Texas Supreme Court was denied on August 1, 2006. Appendix at A 8. A timely petition for rehearing was denied on August 8, 2006. Appendix at A 7. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Texas Rule of Appellate Procedure 58.1 provides that, "The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it."

Texas Constitution article 5, § 3-c(a) provides that, "The supreme court and the court of criminal appeals have jurisdiction to answer questions of state law certified from a federal appellate court."

STATEMENT OF THE CASE

Petitioner seeks review of the Fifth Circuit's refusal to certify the question presented in this case to the Texas Supreme Court: whether a Texas judgment lien remains valid and enforceable so long as the underlying Texas judgment remains valid and enforceable. There is no definitive holding on this

issue by the Texas Supreme Court, and the Fifth Circuit and lower federal courts instead ruled on the merits by using *dicta* from a 1931 intermediate Texas court and ignoring contrary language from a 1985 intermediate Texas court. This ruling by the Fifth Circuit will greatly affect how judgment liens are collected in Texas, the second-largest state both in geography and population. Petitioner believes the federal courts made an incorrect ruling on the merits, that the question should have been certified to the Texas Supreme Court, and asks this Court to grant certiorari to decide whether the lower courts abused their discretion in refusing to certify this question.

Petitioner seeks review of the Fifth Circuit's refusal to certify because it is in conflict with prior rulings of this Court discussing the benefits of certification in *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) and *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997). This ruling also conflicts with the following results from the Second and Fifth Circuits, which certified state law questions when there was no definitive holding from the highest state court or when there were divergent views in the intermediate appellate court: *Liriano v. Hobart Corp.*, 132 F.3d 124, 132 (2nd Cir. 1998), *Grubbs v. Gulf International Marine, Inc.*, 985 F.2d 762 (5th Cir. 1993) and *First National Bank of Boston v. Viking Maritec, Inc.*, 26 F.3d 580 (5th Cir. 1994).

On October 9, 1991, after a jury trial, a judgment was rendered against Van Rippstein in the principal amount of $610,000.00, plus costs of court and post judgment interest. This civil judgment arose from Mr. Rippstein's embezzlement of money from the Plaintiff for which he was ultimately convicted. On May 18, 1992, a corresponding Abstract of Judgment was recorded and indexed in Comal County, Texas.

On March 1, 1994, Van Rippstein married Cynthia Rippstein. In May and June of 1994, Cynthia Rippstein entered into a contract to purchase the Rolling Oaks Property in Comal County, Texas for $110,000.00, signing a promissory note to the sellers for a portion of that price. Since it was acquired during marriage, the Rolling Oaks Property was presumptively community property. Thereafter, on August 19, 1994, Van Rippstein and Cynthia Rippstein declared another piece of property, located at 1334 Mockingbird Lane in Seguin, Texas, as their legal homestead.

On September 17, 2001, a Comal County Writ of Execution issued on the Judgment, *which prevented the judgment from becoming dormant.* The Writ of Execution was delivered to Benny B. Scroggin, Constable, Precinct 4 of Comal County, Texas, and returned *nulla bona* on December 12, 2001. Approximately eighteen months later, on June 4, 2003, the Rolling Oaks Property was sold to Nunez for $1.75 million. The judgment was not paid at the time the Rolling Oaks Property was conveyed to Nunez, and the judgment had not become dormant due to the 2001 writ of execution; therefore, *Nunez was on notice of the non-dormant judgment* involving Mrs. Rippstein's husband.

At the June 4, 2003 closing, in an obvious attempt to hide property from judgment creditors like TAPSS, Van Rippstein signed a quitclaim deed, conveying his interest in the Rolling Oaks Property to his wife, Cynthia Rippstein, who then conveyed the couple's collective interest in the Rolling Oaks Property to Nunez. Van Rippstein also signed an affidavit indicating the property located at 1330 Mockingbird Lane, Seguin, Texas 78155 was the couple's legal homestead.

On July 18, 2003, TAPSS acquired the Judgment by assignment. A second abstract was filed in the official records of Comal County, Texas, on August 29, 2003, which updated the information that was in the original abstract. On October 2, 2003, TAPSS attempted to execute the Judgment in Comal County, Texas by seizing real and personal property, including the Rolling Oaks property.

The judgment debtor's wife, Mrs. Rippstein, then commenced suit in state court in October 2003 in an effort to avoid seizure of the Rolling Oaks property, styled and numbered as Cause No. C-2003-945B, *Cynthia Morgan Rippstein v. TAPSS, LLC, and Benny B. Scroggin, Constable, Comal County Justice Precinct 4*, filed in the 207th District Court of Comal County, Texas. That suit initially sought a temporary restraining order and injunctive relief to prevent execution of the writ. TAPSS filed a counterclaim seeking a declaratory judgment that the Judgment Lien was valid and enforceable against the community property of Cynthia Morgan Rippstein and Van Rippstein, including the Rolling Oaks property. TAPSS further contended that the Rolling Oaks Property transfer was a fraudulent conveyance because it was transferred with intent to defraud TAPSS, while the Judgment was still valid and non-dormant, and while the Judgment Lien was on file in Comal County. TAPSS also filed a third-party action against Nunez for foreclosure of the Judgment Lien. *Nunez moved in state court for summary judgment*, arguing that the Judgment Lien had expired pursuant to state law, *and that motion was denied on February 6, 2004, by the state district court, Hon. Charles Ramsey presiding.*

Thereafter, TAPSS impleaded Van Rippstein into the state court proceeding. On April 24, 2004, the day before Van Rippstein was due to respond to discovery served by TAPSS,

Cynthia Rippstein filed a voluntary bankruptcy petition in the United States Bankruptcy Court for the Western District of Texas, Austin, Division. That petition was transferred to the San Antonio Division in May 2004.

In the bankruptcy court proceeding, Nunez, in July of 2004, re-urged its previously-denied motion for summary judgment, and Mrs. Rippstein and TAPSS also moved for summary judgment. On September 13, 2004, *the bankruptcy court overruled the state court's decision* by signing an order granting Nunez' Motion for Partial Summary Judgment. The bankruptcy court did not grant either Mrs. Rippstein's or TAPSS' motions. The bankruptcy court did not discuss the issues of fraudulent conveyance, fraudulent transfer, community property or homestead raised in the summary judgment pleadings, but instead solely based its order on its finding that the Judgment Lien had expired when the property was conveyed to Nunez on June 4, 2003, and that since no lien existed (even though the Judgment was not dormant) at the time of transfer, neither the Rippsteins nor Nunez were obligated to pay the Judgment Lien. The bankruptcy court's decision is reproduced in the Appendix at A 15-18. Subsequently, TAPSS, Cynthia Rippstein and Van Rippstein settled the claims remaining among them.

TAPSS filed a Motion for Reconsideration of the bankruptcy court's summary judgment, pointing out the failure to consider the above-referenced issues, but that motion was denied. An Order Dismissing Claims in Adversary Proceeding was signed on December 6, 2004. That order specifically allowed TAPSS to appeal the summary judgment granted in favor of Nunez Company, among other rights and abilities retained by TAPSS. The district court affirmed the bankruptcy court's decision in a September 30, 2005, Opinion and Order,

reproduced in the Appendix at A 9-14. The Fifth Circuit affirmed the District Court's opinion in a July 10, 2006, opinion that will be reported in a future volume of the Federal Appendix, and is reproduced in the Appendix at A 1-6.

All the lower federal courts based their decision on *dicta* contained in a half-sentence from a 1931 appellate decision, *Burton Lingo Co. v. Warren*, 45 S.W.2d 750, 752 (Tex. Civ. App. – Eastland 1931, writ ref'd) (". . . that lien, when once it terminates by the expiration of the ten- year period, can never be extended"), without recognizing that the "can never be extended" portion of the dicta creates an absurd result that a judgment lien cannot be renewed after ten years, meaning that a judgment creditor would lose its "first-in-time" priority at subsequent filing of an abstract of judgment. The *Burton Lingo* dicta did not cite any case law for this proposition and seems to have been an afterthought unnecessary to the determination of that case. Furthermore, the only Texas court that has actually ruled upon this issue has held that a judgment lien did not become dormant at ten years where the underlying judgment did not become dormant. *Churchill v. Russey*, 692 S.W.2d 596, 597-8 (Tex. App. – Fort Worth 1985, no writ). Yet, none of the lower federal courts considered *Churchill*, which was cited in briefing by Petitioner.

Petitioner also sought certification of this state law issue in the District Court (acting as an appellate court reviewing the bankruptcy Court's decision) and the Fifth Circuit, since Texas law only allows certification of questions certified from a federal *appellate* court. Texas Rule of Appellate Procedure 58.1 and Texas Constitution article 5, § 3-c(a). Both courts denied certification, and Petitioner contends, came to the wrong result on the merits. Certiorari is sought from this Court to determine whether the Fifth Circuit abused its discretion in

failing to certify this question to the Texas Supreme Court.

REASONS FOR GRANTING THE PETITION

"Certification is an alternative to prognostication." *Todd v. Societe Bic, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) [*citing Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) and Wright, Miller & Cooper, 17A *Federal Practice and Procedure* § 4248 (2d ed. 1988)]. "

> Certification is particularly appropriate when the state's highest court has cast doubt on the scope or continued validity of one of its earlier holdings, or when there is some law in the intermediate state courts, but no definitive holding by the state's highest tribunal.

Liriano v. Hobart Corp., 132 F.3d 124, 132 (2nd Cir. 1998) (certifying question on whether negligent failure to warn claim can survive where liability based upon a design defect claim is precluded where there were divergent views in the intermediate appellate courts).

This Court, in vacating and remanding to the Second Circuit to decide whether a controlling issue of state law should be certified to the Florida Supreme Court, stated:

> The dissenter on the Court of Appeals urged that that court certify the state-law question to the Florida Supreme Court . . . . That path is open to this Court and to any court of appeals of the United States. . . .

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. [Footnote omitted.] Its use in a given case rests in the sound discretion of the federal court.
>
> Here resort to it would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.

Lehman Bros. v. Schein, 416 U.S. 386, 389-91 (1974). And in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997), in which this Court vacated and remanded with instructions for the District Court to dismiss because of pending state court litigation that would answer the state law question presented, this Court wrote:

> Certification procedure, in contrast, allows a federal court faced with a novel state law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response. [Citation omitted]. Most states have adopted certification

procedures. *See generally* 17A Wright, Miller & Cooper, *supra*, § 4248. Arizona's statute. . . permits the State's highest court to consider questions certified to it by federal district courts, as well as courts of appeals and this Court.

Both lower federal courts in this case refused to invite the aid of the Arizona Supreme Court because they found the language of Article XXVIII "plain," and the Attorney General's limiting construction unpersuasive. See 730 F. Supp., at 315-316; 69 F. 3d, at 928-931. 30 Furthermore, the Ninth Circuit suggested as a proper price for certification a concession by the Attorney General that Article XXVIII "would be unconstitutional if construed as [plaintiff Yniguez] contended it should be." Id., at 930; *see id.*, at 931, and n. 14. Finally, the Ninth Circuit acknowledged the pendency of a case similar to Yniguez's in the Arizona court system, but found that litigation is no cause for a stay of the federal court proceedings. [Citations omitted].

A more cautious approach was in order. Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save "time, energy, and resources and hel[p] build a cooperative judicial federalism." *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). . . .

The Fifth Circuit refused to certify the state law question to the Texas Supreme Court because it thought the plain meaning of the statute was unambiguous. App. at A 6. Just as in *Arizonans v. Official English, supra*, a more cautious approach was in order, and the state law question presented herein should have been certified to the Texas Supreme Court. A question regarding priority of creditors was certified to the Louisiana Supreme Court by the Fifth Circuit in *First National Bank of Boston v. Viking Maritec, Inc.*, 26 F.3d 580 (5th Cir. 1994).

The Fifth Circuit, as did the lower federal courts, refused to consider contrary appellate authority, *Churchill v. Russey*, 692 S.W.2d 596 (Tex. App. – Fort Worth 1985, no writ), in deciding this case. But in *Grubbs v. Gulf International Marine, Inc.*, 985 F.2d 762 (5th Cir. 1993), the Fifth Circuit did certify a question to the Louisiana Supreme Court when subsequent intermediate appellate decisions cast doubt on the panel's original decision. The dicta relied on by the lower courts contained in *Burton Lingo v. Warren*, 45 S.W.2d 750 (Tex. Civ. App. – Eastland 1931, writ ref'd) does not comport with the holding in *Churchill*, *supra*, and certification on this basis should have been granted as well.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-51671

Summary Calendar

In Re: CYNTHIA MORGAN RIPPSTEIN

Debtor,

TAPSS, LLC,

Appellant,

versus

NUNEZ COMPANY,

Appellee.

Appeal from the United States District Court
for the Western District of Texas
(5:05-CV-61)

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The district court affirmed the judgment of the bankruptcy court, which granted summary judgment to Nunez Company ("Nunez"). TAPSS, LLC, appeals the district court's decision and also moves to certify the legal question at issue to the Texas Supreme Court. We affirm the judgment of the district court and deny the motion to certify the question.

I. FACTS AND PROCEEDINGS

The facts of this case are undisputed. In October 1991, a judgment was rendered against Van Rippstein in the amount of $610,000 plus costs and interest. In May 1992, an abstract of judgment was recorded and indexed in Comal County, Texas, creating a judgment lien on Van Rippstein's real property in Comal County, including after-acquired real property. *See* TEX. PROP. CODE § 52.001. Van Rippstein married Cynthia Rippstein two years later, and shortly thereafter, Cynthia Rippstein purchased property, called the Rolling Oaks property, in Comal County. Acquired during marriage, the property was community property. TEX. FAM. CODE § 3.002.

In September 2001, a writ of execution issued on the 1991 judgment, preventing the judgment from becoming dormant. *See* TEX. CIV. PRAC. & REM. CODE § 34.001. In June 2003, Cynthia Rippstein sold the Rolling Oaks property to Nunez for $1.75 million. At the time of the closing, Van Rippstein conveyed his interest in the property to his wife by quitclaim deed, and she in turn sold the collective share to Nunez. The judgment was still unpaid at the time of sale. In July 2003, TAPSS acquired the 1991 judgment by assignment. In August 2003, more than ten years after the May 1992 abstract of judgment, a second abstract of judgment was filed in Comal County. TAPSS then attempted to execute the

judgment by seizing, among other property, the Rolling Oaks property.

Cynthia Rippstein brought suit in state court, seeking a temporary restraining order and injunctive relief to prevent execution of the judgment. TAPSS filed a counter claim seeking declaratory judgment that the judgment lien was valid and also filed a third-party action against Nunez for foreclosure of the judgment lien. After Cynthia Rippstein filed for chapter eleven bankruptcy, the proceedings continued in bankruptcy court. Nunez moved for summary judgment. The bankruptcy court granted the motion, finding (1) that, under TEX. PROP. CODE § 52.006, the judgment lien terminated after ten years, and (2) that, therefore, the Rolling Oaks property was not encumbered at the time of the sale in June 2003. The district court affirmed the decision of the bankruptcy court. TAPSS appeals this ruling and moves to certify the question of the interpretation of § 52.006 to the Texas Supreme Court.

II. STANDARD OF REVIEW

"We review the decision of a district court, sitting as an appellate court, by applying the same standards of review to the bankruptcy court's findings of fact and conclusions of law as applied to the district court." *U.S. Dept. of Educ. v. Gerhardt* (*In re Gerhardt*), 348 F.3d 89, 91 (5th Cir. 2003) (citing *Total Minatome Corp. v. Jack/Wade Drilling, Inc.* (*In re Jack/Wade Drilling, Inc.*), 258 F.3d 385, 387 (5th Cir. 2001)). Findings of fact are reviewed for clear error; conclusions of law, de novo. *Id.* We also review de novo the bankruptcy court's grant of summary judgment. *Ingalls v. Erlewine* (*In re Erlewine*), 349 F.3d 205, 209 (5th Cir. 2003); *Zer-Ilan v. Frankford* (*In re CPDC, Inc.*), 337 F.3d 436, 441 (5th Cir. 2003).

III. DISCUSSION

The parties agree that the sole issue is the interpretation of TEX. PROP. CODE § 52.006. Section 52.006, which is entitled "Duration of a Lien," provides: "A judgment lien continues for 10 years following the date of recording and indexing the abstract, except that if the judgment becomes dormant during that period the lien ceases to exist." The parties do not dispute that the judgment had not become dormant and that a judgment lien arose based on the abstract of judgment recorded in May 1992. The parties do dispute whether the judgment lien still encumbered the Rolling Oaks property at the time it was conveyed to Nunez in June 2003, more than ten years after the May 1992 abstract of judgment was filed. Nunez contends that the statute provides that the judgment lien expired at the conclusion of ten years. TAPSS maintains that the lien was still valid, because the underlying judgment had not become dormant.

Under Texas law, a court construes a statute in accordance with the legislative intent. *Dept. of Protective & Regulatory Servs. v. Schutz*, 101 S.W.3d 512, 520 (Tex. App. 2002) (citing, *inter alia*, *Albertson's Inc. v. Sinclair*, 984 S.W.2d 958, 960 (Tex. 1999)). *See also In re CPDC*, 337 F.3d at 442 (citing *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000)). In doing so, a court first looks to the statute's language and presumes that the legislature intended the plain meaning of the statute's terms. *Schutz*, 101 S.W.3d at 520 (citations omitted); *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). If a statute is unambiguous, a court may not employ other rules of construction to create ambiguity but should give the statute its common meaning. *Fitzgerald*, 996 S.W.2d at 865–66; *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex.

1997).

TAPSS argues that the statute should be interpreted broadly. TAPSS states that the word "continues" used in the statute is not the same as "expires" and that the statute should be read to provide for the continuance of the lien as long as the judgment is not dormant. However, TAPSS's suggested interpretation of § 52.006 is contrary to the plain language of the statute. The statute explicitly provides that a judgment lien lasts ten years, unless the underlying judgment becomes dormant, in which case the lien expires before ten years have lapsed. "Continues for" is synonymous with "lasts" or "expires after" in this provision; otherwise, the "10 years" time-frame would be meaningless. The plain language of the statute does not suggest that the lien continues beyond ten years as long as the underlying judgment remains valid. Additionally, § 52.001, which provides for the establishment of the lien, references both a "first" and "subsequent" abstract of judgment; in other words, the statute anticipates that a subsequent abstract may be filed to extend the lien beyond ten years. Consequently, we agree with the district court that a judgment lien terminates at the expiration of the ten year period, even if the underlying judgment is not dormant.

Though the plain meaning of the statute dictates this result, we also find support in other sources. Early Texas cases, which discuss the predecessor statute of § 52.006 have made clear that a judgment lien terminates at the conclusion of ten years. *See Burton Lingo Co. v. Warren*, 45 S.W.2d 750, 752 (Tex. App. 1931); *Nichols v. Cansler*, 140 S.W.2d 254, 256 (Tex. App. 1940). *See also* TEX. GOVT. CODE § 311.023 (providing that, when construing a statute, a court may consider a former statutory provision). Recently, in *Olivares v. Nix Trust*, a Texas appellate court cited to one of the early cases for

the proposition that "a judgment lien terminates by the expiration of the ten-year period." 126 S.W.3d 242, 249 (Tex. App. 2003) (citing *Burton Lingo Co.*, 45 S.W.2d at 752). Finally, various Texas practice guides employ the same interpretation of § 52.006 as that of the bankruptcy and district courts. *See, e.g.*, 5 ELAINE A. GRAFTON CARLSON, MCDONALD & CARLSON TEXAS CIVIL PRACTICE § 31.17 (2005); 1 W. MICHAEL BAGGETT & BRIAN THOMPSON MORRIS, TEXAS PRACTICE GUIDE: REAL ESTATE LITIGATION §1:101 (2006). Because the plain language of the statute is clear, and because we find support for the plain interpretation in other sources, we reject TAPSS' various arguments that the statute should be interpreted in a manner inconsistent with its common meaning.

Finally, we deny TAPSS' motion to certify. Texas Rule of Appellate Procedure 58.1 provides that the Texas Supreme Court may answer question of law certified to it if the certifying court is presented with question of Texas law without controlling Texas Supreme Court precedent. TEX. R. APP. P. 58.1. The decision whether to certify a question or not lies within our sound discretion. *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 487 (5th Cir. 2003) (citing *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm.*, 283 F.3d 650, 656 (5th Cir. 2002)). Generally, we will not certify questions where Texas law is sufficiently clear. *See id.* Because the plain meaning of § 52.006 is unambiguous, we see no need to certify the question at issue to the Texas Supreme Court.

IV. CONCLUSION

The judgment of the district court is AFFIRMED. The motion to certify is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-51671

In Re: CYNTHIA MORGAN RIPPSTEIN

Debtor,

TAPSS, LLC,

Appellant,

versus

NUNEZ COMPANY,

Appellee.

Appeal from the United States District Court
for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

A 8

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-51671

In Re: CYNTHIA MORGAN RIPPSTEIN

Debtor,

TAPSS, LLC,

Appellant,

versus

NUNEZ COMPANY,

Appellee.

Appeal from the United States District Court
for the Western District of Texas, San Antonio

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:

This panel previously denied appellant's motion to certify questions to the Texas Supreme Court. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is denied.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-05-CA-061-OG

TAPSS, L.L.C.,
Appellant,

v.

NUNEZ COMPANY

Appellee.

OPINION AND ORDER

Pending before the Court is an appeal from a decision by the United States Bankruptcy Court, Western District of Texas, granting third-party defendant Nunez Company's Motion for Partial Summary Judgment in Case No. 04-52915-RBK. Appellant TAPSS, LLC filed its brief on April 11, 2005 (Dkt. # 6), and Appellee Nunez Company filed its brief on April 26, 2005 (Dkt. # 8). Appellant also filed a Motion to Certify a Question to the Texas Supreme Court (Dkt. # 5) and Appellee filed a response thereto (Dkt. # 7). After reviewing the record and the applicable law, the Court finds as follows:

Standard of Review

The issue presented to the Court is whether the bankruptcy judge correctly determined that a judgment lien, held by the Appellant, expired even though the underlying judgment against the judgment debtor remained valid. Because

this appeal presents a question of law, the bankruptcy court's judgment is subject to *de novo* review. Bradley v. Pacific Southwest Bank, 960 F.2d 502, 507 (5th Cir. 1992).

Factual and procedural background

The parties agree to the following facts: On October 9, 1991, a money judgment (the "judgment") was rendered against Van John Harper Rippstein (the "judgment debtor") in the amount of $610,000.00 plus costs and post judgment interest. On **May 18, 1992**, an abstract of the judgment was recorded in the official public records of Comal County, Texas. On or about June 22, 1994, judgment debtor and his spouse, Cynthia Rippstein, acquired a piece of unimproved real property located in Comal County at 3220 Rolling Oaks Drive, New Braunfels, Texas (the "Rolling Oaks Property") for approximately $110,000.00. Thereafter, on August 19, 1994, the judgment debtor and his spouse declared another piece of property as their legal homestead. A w[r]it of execution was issued on the underlying judgment on September 17, 2001 and returned *nulla bona* on December 12, 2001. On **June 4, 2003**, the Rolling Oaks Property was sold for 1.75 million dollars to Nunez Company. The judgment was not paid at the time of the sale.

The record also shows that TAPSS acquired rights under the judgment by assignment on July 18, 2003. After acquiring the judgment, TAPSS filed a second abstract of judgment in Comal County on **August 29, 2003**. On September 2, 2003, TAPSS obtained an "alias" writ of execution[1] on the judgment. TAPSS attempted to seize the Rolling Oaks Property when executing the writ, and litigation

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[1] "Alias" writ of execution means a second execution issued to enforce a judgment not fully satisfied by the original writ. BLACK'S LAW DICTIONARY 1608 (6 ed. 1990).

ensued. The lawsuit began in state court, and continued in bankruptcy court after the judgment debtor sought relief under Chapter 11. This appeal arises from the bankruptcy court's order granting third party defendant Nunez Company's motion for partial summary judgment. The bankruptcy judge determined that the underlying judgment held by the Appellant was valid and had not become dormant. However, the bankruptcy judge also determined that the first abstract of judgment had expired and a second abstract of judgment was not on file when the property was conveyed. Thus, the Appellee received title to the property from the judgment debtor without the encumbrance of a lien held by Appellant.

Legal analysis

In Texas, fixing a judgment lien is strictly construed under the statute regulating abstracts of judgment. Tex. Prop. Code Ann. § 52.001 et seq. (Vernon 2005); Apostolic Church v. American Honda Motor Co., 833 S.W.2d 553, 554 (Tex. App. – Tyler 1992, writ denied); Citicorp Real Estate, Inc. V. Banque Arabe Internationale D'Investissement, 747 S.W.2d 926, 929 (Tex. App. – Dallas 1988, writ denied). There are three steps to secure and maintain a lien against a judgment debtor. First, in order to establish the lien, after judgment is rendered, the judgment creditor must obtain and file an abstract of judgment in accordance with Chapter 52 of the Texas Property Code. See Tex. Prop. Code Ann. § 52.001-52.004 (Vernon 2005). Second, the underlying judgment must be kept alive through the issuance of writs of execution. Tex. Civ. Prac. & Rem. Code Ann. § 34.001(a) (Vernon 2005). Finally, if the lien is not satisfied with[in] ten (10) years following the date of recording and indexing of the abstract of judgment, then a subsequent abstract of judgment must be obtained and recorded in accordance with Chapter 52 of the Texas Property

Code. Tex. Prop. Code Ann. § 52.001, 52.006 (Vernon 2005).

Once a first or subsequent abstract of judgment is recorded and indexed in the county where the defendant owns real property, the abstract constitutes a lien. Tex. Prop. Code Ann. § 52.001 (Vernon 2005). To create a valid lien, the underlying judgment must not be dormant and the abstract must be recorded and indexed according to the requirements established in Chapter 52 of the Texas Property Code. Tex. Prop. Code Ann. §§ 52.001 – 52.0041 (Vernon 2005). A dormant judgment is one which has remained unexecuted so long that execution is not possible without first reviving the judgment. Burlington State Bank v. Marlin Nat. Bank, 207 S.W. 954, 956 (Tex. Civ. App – Austin 1918, no writ). To prevent dormancy, a writ of execution must be issued within ten years after rendition of the judgment. Tex. Civ. Prac. & Rem. Code Ann. § 34.001 (Vernon 2005). Subsequent writs may be issued at any time within ten years after issuance of the preceding writ. Tex. Civ. Prac. & Rem. Code Ann. § 34.001(b) (Vernon 2005). A judgment will then remain active for ten (10) years following the most recent writ of execution. See, e.g., Gartin v. Ferguson, 144 S.W.2d 1114, 1115 (Tex. Civ. App. – Amarillo 1940, no writ). If a judgment is allowed to become dormant, then a writ of execution cannot be issued without first reviving the judgment. Tex. Civ. Prac. & Rem. Code Ann. §§ 31.006, 34.001 (Vernon 2005); Burlington State Bank, 207 S.W. at 954. The judgment must be revived within two years from the date it became dormant. Tex. Civ. Prac. & Rem. Code Ann. § 31.006.

When a judgment lien terminates by the expiration of the ten-year period, it can never be extended. Burton Lingo Co. v. Warren, 45 S.W.2d 750, 752 (Tex. Civ. App. – Eastland 1931, writ ref'd); see Tex. Prop. Code Ann. § 52.006. If the

underlying judgment has not become dormant, another abstract of the same judgment may be filed in the same county where the first abstract was filed, recorded, and indexed so as to create another lien to secure payment. Tex. Prop. Code Ann. § 52.001; Burton Lingo, 45 S.W.2d at 752; U.S. v. Blakeman, 750 F. Supp. 216 (N.D. Tex. 1990), aff'd in part, rev'd in part on other grounds, 997 F.2d 1084 (5th Cir. 1992). The subsequent abstract may be issued even after the expiration of ten years from the filing, recording, and indexing of the preceding abstract. However, if the underlying judgment has become dormant, then the judgment must first be revived. Tex. Civ. Prac. & Rem. Code Ann. § 31.006.

Under the facts in this case, the judgment has never been allowed to become dormant under Texas law because of the issuance of writs of execution.[2] However, the judgment lien was allowed to expire for a period of time. The original judgment was rendered on October 9, 1991 and the judgment lien was established when the judgment creditor filed the first abstract of judgment on May 18, 1992 in the official public records of Comal County, Texas. This judgment lien had a statutory life of ten (10) years from **May 18, 1992 to May 18, 2002.** See Tex. Prop. Code Ann. § 52.006 (Vernon 2005). The Appellant filed a subsequent abstract of judgment on August 29, 2003 in Comal County. According to the Texas Property Code, this second lien is valid from **August 29, 2003 to August 29, 2013.** The first lien expired on **May 18, 2002** and the subsequent lien did not attach until **August 29, 2003.** After the first lien expired, and before the second lien attached, there was no valid lien on the property. This allowed Appellee to receive title to the Rolling Oaks Property from the judgment

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[2] First writ of execution was issued on September 17, 2001 and an "alias" writ of execution was issued on October 2, 2003.

debtor without the encumbrance of a lien.

The bankruptcy court did not err in holding that the judgment lien had expired even though the underlying judgment remained valid.

It is therefore ORDERED that the Motion to Certify a Question to the Texas Supreme Court is DENIED, and the order granting Third-Party Defendant Nunez Company's Motion for Partial Summary Judgment is AFFIRMED.

SIGNED and ENTERED this 30 day of September, 2005.

/s/ Orlando L. Garcia
United States District Judge

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Case No. 04-52915-RBK
Chapter 11
Adversary No. 04-5085-RBK

IN RE: CYNTHIA MORGAN RIPPSTEIN, DEBTOR

CYNTHIA MORGAN RIPPSTEIN

vs.

TAPSS, LLC

vs.

NUNEZ COMPANY

ORDER GRANTING "THIRD-PARTY DEFENDANT, NUNEZ COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT"

On August 23, 2004, came on to be heard "Third-Party Defendant, Nunez Company's Motion for Partial Summary Judgment" (Court document #15). Plaintiff, Defendants, and Third-Party Defendant appeared by and through their attorneys of record and announced ready. After reviewing the summary judgment evidence on file at the time of the hearing and after hearing argument of counsel, the Court is of the opinion that the Motion should be granted for the reasons set forth herein.

The time line in this adversary proceeding is critical.

On October 9, 1991, a state court judgment was signed against Van John Harper Rippstein. Execution was obtained on the judgment, but the judgment was not satisfied. The judgment has not become dormant at any time since it was signed.

On May 18, 1992, an abstract of judgment was filed in Comal County. Van Rippstein and Debtor were married on March 1, 1994. Without deciding whether the judgment lien against Van Rippstein actually attached to the Debtor's real property, pursuant to Tex. Prop. Code Ann. § 52.006 (Vernon 1995), the judgment lien would have continued for ten years following the date of recording and indexing of the abstract. The abstract of judgment therefore expired on or about May 18, 2002. On June 4, 2003, Debtor, Cynthia Rippstein, conveyed a sixty acre tract of land located in Comal County to Third Party Defendant, the Nunez Company. Two and a half months later, on August 29, 2003, a second abstract of judgment was filed in Comal County on the same state court judgment.

The judgment holder, TAPSS, contends that its abstract of judgment lien originally filed on May 18, 1992, continued until the deed to the Nunez Company was executed and recorded on June 4, 2003. Section 52.006 of the Property Code provides:

> A judgment lien continues for 10 years following the date of recording and indexing the abstract, except that if the judgment becomes dormant during that period the lien ceases to exist.

Tex. Prop. Code Ann. § 52.006 (Vernon 1995). TAPSS asserts that the judgment lien continues beyond the ten years provided in the statute. This contention is rejected by ***Burton Lingo Co.***

v. Warren, 45 S.W.2d 750 (Tex. Civ. App. – Eastland 1931, writ ref'd). In ***Burton Lingo***, the court of civil appeals held that the statute means what it says:

> There can be no doubt, we think, that as to the particular lien which comes into existence by the recording and indexing of an abstract of judgment, that lien, when once it terminates by the expiration of the ten-year period, can never be extended.

45 S.W.2d at 752. In other words, the lien continues for ten years, but not one day more unless a new abstract of judgment is filed which then runs from the date of the filing of the second abstract of judgment. With its writ history, ***Burton Lingo*** carries the weight of a Texas Supreme Court opinion.

In this adversary proceeding, the Debtor conveyed the sixty acre Comal County property to the Nunez Company approximately one year *after* the first abstract of judgment expired and more than two months *prior* to the filing of a second abstract of judgment. Because of this gap in the abstract of judgment lien, the sixty acre tract conveyed to the Nunez Company had no abstract of judgment lien which could attach to it at the time the property was conveyed. For that reason, the Nunez Company received title to the property without the encumbrance of the TAPSS abstract of judgment lien.

It is, therefore, **ORDERED, ADJUDGED AND DECREED** that the Motion for Partial Summary Judgment filed by the Nunez Company be **GRANTED** ***and that partial summary judgment be rendered denying all relief requested by TAPSS against the Nunez Company and dismissing the***

Nunez Company from this adversary proceeding. This adversary proceeding shall remain pending, however, as to all remaining parties.

/s/ Ronald B. King
United States Bankruptcy Judge